Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

COMMENTS OF VIACOM INC.

Howard F. Jaeckel

51 West 52nd Street
New York, New York 10019

Its Attorney

December 18, 2000

TABLE OF CONTENTS

SUMMARY

In its Notice of Proposed Rulemaking in this proceeding, the Commission tentatively concludes that television stations should be required to complete, on a quarterly basis, a new standardized form reporting how much of certain types of governmentally-favored programming they have broadcast. Further, while recognizing that fully one-third of television stations in the top 100 markets do not currently have a Web site at all, the Commission nonetheless proposes that all licensees now be required to make available the complete contents of their public inspection files on the Internet.

Although these proposals have their genesis in a Notice of Inquiry concerning the public interest obligations of digital television stations, it is obvious that they have nothing at all to do with the transition to digital broadcasting. Far from using the digital transition as an occasion for recycling the discarded regulatory policies of the past, the Commission must be wary of imposing unnecessary new rules on television broadcasters if the growth of a competitive --and free -- digital television service is to be fostered.

The Commission's proposals in this rulemaking proceeding are fundamentally at odds with steps it took in the mid-1980s to significantly deregulate television broadcasting. Thus, in its 1984 *Report and Order* in the television deregulation proceeding ("*Television Deregulation*"), the Commission eliminated the quantitative guidelines for the broadcast of informational, local and non-entertainment programming which it had previously used in the processing of license renewal applications concluding that "licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives." The Commission also found that the regulatory scheme conflicted with the Commission's traditional effort "to avoid [a quantitative] regulatory approach." In addition, the

Commission eliminated formal ascertainment requirements in its 1984 deregulation order, finding that market forces would provide "adequate incentives for licensees to remain familiar with their communities."

In place of its quantitative processing guidelines, and its logging and ascertainment rules, the Commission adopted a requirement that each commercial television licensee place in its public file, on a quarterly basis, a report detailing the most significant programming regarding issues of community concern which it had broadcast during the previous three months. The Commission found that such an issues/program report would be a better source of information regarding a licensee's public interest programming than an exhaustive log, which it found unnecessary "to document the current program obligation which is directed to issues of [community] concern ... rather than to categories or amounts of programs."

In an abrupt departure from its decision in *Television Deregulation,* the Commission in the present Notice proposes to replace the issues/program list with a standardized form requiring broadcasters to report on the "categories of programming" they have broadcast. This proposal would not only impose new record-keeping burdens on broadcasters, but, even more troubling, would constitute a serious encroachment on broadcasters' First Amendment rights. Thus, the obvious purpose of such a requirement would be to exploit the vulnerability of broadcasters to the license renewal process to skew their editorial judgments in a direction favored by the government. Nor can it be questioned that this stratagem would likely prove highly effective; few broadcasters, confronted with a Commission form demanding to know how many minutes or hours they had devoted to a program category singled out for special attention by the Commission would feel secure in answering "none." And any indication by the Commission of an amount of a particular kind of programming which is "recommended,"

or which would satisfy a "processing guideline," is sure to be taken as a command by any prudent broadcaster. The courts have long recognized the constitutional implications of such "raised eyebrow" regulation.

The First Amendment implications of the proposed rules would be greatly magnified should the Commission also adopt quantitative standards as to the minimum amounts of programs in various categories which should be broadcast, as some have proposed. Such rules would both conflict with the Commission's long-standing reluctance to quantify broadcasters' public interest obligations, and strain the limits of the Commission's constitutional authority to regulate broadcast content. From the earliest days of broadcasting, the Commission has been chary of specifying exactly how much of particular types of programming a licensee must present in order to meet its public interest obligations. And the courts have been no less sensitive to the First Amendment issues which would be raised by Commission regulations specifying the precise amounts of different types of programming which a broadcaster must present.

The Commission's adoption of a standardized form requiring broadcasters to report how much of particular program types they had aired would thus clearly raise serious First Amendment questions. This would be especially so if such a form were required in conjunction with precise numerical standards as to the minimum amounts of such programming necessary to presumptively satisfy the Commission. But it would also be true even in the absence of requirements other than the coercive demand for such programming which would be implicit in the Commission's inquiry as to how much of it had been presented.

There is no need for the Commission to embark on this path. Since 1984, the quarterly issues/program report adopted by the Commission in *Television Deregulation* has served to document the compliance of television station licensees with their bedrock

public interest obligation -- that is, to provide programming responsive to issues of community concern. These reports are completely adequate to the needs of a regulatory framework that requires television licensees to address public needs in their programming, but leaves the manner and appropriate "program mix" for doing so to their good-faith editorial discretion. The Commission should therefore decline to adopt a standardized form requiring licensees to report on how much of particular categories of programming they have broadcast.

Similarly, the Commission should reject proposals that it require licensees to provide in a quarterly report "a narrative description ... of the actions taken, in the normal course of business, to assess a community's programming needs and interests." Although the Commission seeks to distinguish such a potential requirement from its former ascertainment rules -- which it repealed as unnecessary in 1984 -- on the ground that its current proposal would be less burdensome, the burden imposed on broadcasters was not the only reason the Commission repealed its former ascertainment requirements; it also found there was "no evidence" that the rules had any beneficial effects. Therefore, the fact that the bureaucratic burdens that would be entailed by the rule now being contemplated would be less extensive than those imposed by the old ascertainment requirements is no reason to adopt them. The present proposal, like the former requirements, would accomplish nothing of value.

Finally, the Notice proposes that television licensees be required to post the entire contents of their public inspection files on the Internet, either on their own Web sites or on Web sites maintained by state broadcaster associations. Such a rule is beyond the proper scope of the Commission's regulatory authority, since maintaining a Web site -- let alone posting the voluminous contents of a public inspection file -- is simply too far afield from the core activities of broadcasting for the Commission to regulate under its

statutory mandate. *See, NAACP v. FPC,* 425 U.S. 662 (1976) . But the Commission's manifest lack of jurisdiction is not the only reason why it should decline to adopt the proposed regulation. Just as importantly, the burden which such a rule would impose on broadcasters plainly outweighs the highly dubious character of any possible public benefit.

The only justification for the proposed rule cited by the Commission is the contention of an advocacy group that two-thirds of television stations in the top 100 markets presently have Web sites. Even if one accepts this information, it means that fully one-third of those larger-market stations have found the commercial incentives insufficient to warrant creating and maintaining a Web site; therefore, the Commission's proposed rule would force them to do so *solely for the purpose* of placing the contents of their public files on the Worldwide Web. The Commission offers no figures as to how many stations in the smallest one hundred markets may currently have Web sites, but it is reasonable to assume that an even greater number of those stations would be compelled to design sites for the sole purpose of complying with the Commission's rule.

The costs of such a requirement would hardly be trivial. But in any event, they must be measured against the highly dubious nature of the public benefit which the Commission's proposed rule might be expected to achieve. For all of the Commission's speculation about the advantages of members of the public being able to access a station's inspection file twenty-four hours a day, the fact is that visits to the file are presently exceedingly rare, consisting largely of college students on assignment. To impose on broadcasters a legal obligation to post on the Internet material in which there is so little evident public interest cannot be justified.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom")[1] hereby respectfully submits its comments in the above-captioned proceeding, in which the Commission proposes several rule changes which it suggests will "standardize and enhance public interest disclosure requirements for television broadcasters."[2] Specifically, in its Notice of Proposed Rulemaking ("Notice" or "NPRM"), the Commission tentatively concludes that television stations should be required to complete, on a quarterly basis, a new standardized form reporting how much of certain types of governmentally-favored programming they have broadcast. Further, while recognizing that fully one-third of television stations in the top 100 markets do not currently have a Web site at all,[3] the Commission nonetheless proposes that all licensees

---

1 Viacom is a global media company, which reaches viewers and users across all distribution platforms, including broadcast television, cable and satellite delivered television and the Internet. Through affiliates, Viacom owns and operates the CBS and UPN broadcast networks and television stations affiliated with these networks, basic cable program services, and premium cable program services.

2 Notice of Proposed Rulemaking at 1.

3 *Id.* at 14.

now be required to make available the complete contents of their public inspection files on the Internet.

Although these proposals have their genesis in a Notice of Inquiry concerning the public interest obligations of digital television stations, it is obvious that they have nothing at all to do with the transition to digital broadcasting -- indeed, the Commission acknowledges as much.[4] Nonetheless, the digital transition forms an inescapable part of the backdrop to this proceeding. That is because, on the threshold of the digital era, and at a time when free, over-the-air broadcasting faces unprecedented competitive challenges from a variety of multichannel providers -- not to mention the Internet -- the Commission is considering the imposition of new regulations which will uniquely burden broadcasters. More remarkable still, these proposals are strikingly reminiscent of regulations abandoned by the Commission as unnecessary more than sixteen years ago.

In the comments that follow, we urge the Commission not to use the digital transition as an occasion for recycling the discarded regulatory policies of the past. To the contrary, the Commission should steadfastly decline to impose new rules on television broadcasters where the benefits of such regulations are at best uncertain. By following this course, the Commission can help foster the growth of a competitive --and free -- digital television service.

---

4 *Id.* at 6.

I. Background

1. The Regulatory Context

At the outset, we note that the Commission's proposals in this rulemaking proceeding are fundamentally at odds with steps it took in the mid-1980s to significantly deregulate television broadcasting. Thus, in its 1984 *Report and Order*[5] in the television deregulation proceeding (hereafter "*Television Deregulation*"), the Commission eliminated the quantitative guidelines for the broadcast of informational, local and non-entertainment programming which it had previously used in the processing of license renewal applications.[6] In contrast, the rules suggested by the instant Notice would require television licensees again to report on the quantities of public interest programming they had broadcast by category. Moreover, while the Commission in 1984 found the logging requirements imposed by its previous rules to be burdensome and unnecessary,[7] the Commission's proposed new regulations would, of necessity, once more require broadcasters to keep detailed records of precisely how much of certain kinds of programming they had presented. And although the Commission in *Television Deregulation* made clear that it was interested in the programs broadcast by television

---

5 *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984) ("*Television Deregulation*"), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part, Action for Children's Television v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987).

6 The guidelines provided that any license renewal application reflecting less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming could not be granted by the FCC staff, but required action by the full Commission.

7 *Television Deregulation, supra,* 98 FCC 2d at 1106-11.

stations in response to issues of community concern rather than the means by which they had "ascertained" what those issues were,[8] the current Notice contemplates the reimposition of a requirement that broadcasters' quarterly reports include information indicating how their public interest programming and activities "matched against ascertained community needs and interests."[9]

Because of the stark contrasts between the Commission's *Television Deregulation* order and the direction of the instant Notice, a closer look at the reasons underlying the Commission's 1984 decision is warranted before considering the present proposals in detail.

In eliminating its quantitative license renewal guidelines in 1984, the Commission relied on two "fundamental considerations." First, the Commission found, based on studies of station performance, that broadcasters were providing public interest programming in quantities greater than those prescribed by the regulations, and concluded that "licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines."[10] Second, the Commission found disadvantages "inherent" in the regulatory scheme for a variety of reasons, including that it infringed on the editorial discretion of broadcasters, conflicted with the Commission's traditional effort "to avoid this type of [quantitative] regulatory

---

8 *Id.* at 1101.

9 Notice at 7.

10 *Television Deregulation*, 98 FCC 2d at 1080.

approach," and imposed burdensome compliance costs.[11] In the latter regard, the Commission also repealed its requirement that television licensees retain detailed logs concerning the sources and categories of all programs they broadcast, citing a 1978 GAO report calling the regulation "the largest government burden on business" in terms of total hours expended.[12]

The Commission also eliminated formal ascertainment requirements in its 1984 deregulation order, explaining that "[c]ommercial necessity dictates that the broadcaster must remain aware of the issues of the community or run the risk of losing its audience." Finding that market forces would provide "adequate incentives for licensees to remain familiar with their communities," the Commission concluded that "the need for our ascertainment regulation has declined and will continue to decline, and that the [requirement] should [be] eliminate[d]."[13]

In place of its quantitative processing guidelines, and its logging and ascertainment rules, the Commission adopted a requirement that each commercial television licensee place in its public file, on a quarterly basis, a report detailing the most significant programming regarding issues of community concern which it had broadcast during the previous three months. The report was to include the time, date and duration of each program, as well as a brief narrative description of its contents. The Commission found that such an issues/program report would be a better source of information regarding a licensee's public interest programming than an exhaustive log, which it found

---

11 *Id.* at 1089-90.

12 *Id.* at 1106.

13 *Id.* at 1098-99.

unnecessary "to document the current program obligation which is directed to issues of [community] concern ... rather than to categories or amounts of programs."[14]

In an abrupt departure from its decision in *Television Deregulation,* the Commission in the present Notice proposes to replace the issues/program list with a standardized form requiring broadcasters to report on the "categories of programming" they have broadcast. As discussed below, this proposal would not only impose new record-keeping burdens on broadcasters -- contrary to the goals expressed by the Commission in *Television Deregulation* -- but, even more troubling, would constitute a serious encroachment on broadcasters' First Amendment rights.

2. The Notice's Proposals

As noted, the standardized disclosure form proposed by the Commission in the Notice would require television licensees to report, by category, the public interest programming which they had broadcast during the previous quarter.[15] While the Notice does not say so explicitly, it seems quite apparent that this form would ask licensees to report on the amounts of programming they had broadcast in each of these categories;

---

14 *Id.* at 1109.

15 *See,* Notice at 9, where the Commission states:

> We tentatively conclude that the standardized form should ask questions about categories of programming. We believe that categorization will serve the goal of this proceeding -- to make disclosures about public interest efforts more uniform, easier to understand, and more accessible to the public.

indeed, if it did not do so, it is difficult to see what purpose the Commission's proposed categorization would serve.

In seeking comment on what categories of programming should be included in the proposed reporting obligation, the Commission makes reference to a suggested form appended to the 1998 report of the President's Advisory Committee on the Public Interest Obligations of Digital Broadcasters ("Advisory Committee Report").[16] That form would require broadcasters to indicate how many hours or minutes of programming it had aired during the past three months in the following categories: local and national news programming, local and national public affairs programming, programming that meets the needs of "underserved" communities" (i.e., "people of color, the elderly, gays and lesbians"), programming including "candidate-centered discourse," other local programming, and public service announcements (both "locally-originated" and "other") during various portions of the day (i.e., between 6 AM to midnight and at other times).[17] In addition, the form proposed by the Advisory Committee assumes that the FCC would establish or "recommend" minimum amounts of programming in the areas of public affairs broadcasts, candidate-centered "discourse," and locally-originated and "other" public service announcements.

The Commission's adoption of a form substantially resembling that proposed by the Advisory Committee would, of course, go far beyond requiring "enhanced disclosure" concerning the public interest programming of television licensees; rather, it would effectuate a radical change in the extent to which the Commission now regulates

---

16 *Id.* at 7.

17 Advisory Committee Report at Appendix A..

program content. The Commission, of course, has not endorsed the Advisory Committee proposal, and we therefore assume that it does not contemplate going so far in this proceeding. Nevertheless, as noted above, the Commission's proposal for requiring broadcasters to provide information about their presentation of particular types of programming necessarily implies that they will be asked how much program time they devote to those categories. Viacom urges that no such "disclosure" requirement -- which would clearly pressure television licensees to skew their programming decisions toward those categories favored by the Commission -- be adopted.

II. The Commission Should Not Adopt a Standardized Disclosure Form Requiring Television Licensees to Report on the Quantities of Programming in Particular Categories Which They Have Broadcast, Or the Steps They Have Taken to "Ascertain" Community Needs.

1. Such a Requirement Would Impose Record-Keeping Burdens on Broadcasters of the Very Kind Which the Commission Sought to Eliminate in *Television Deregulation*.

An obvious effect of adopting the standardized reporting form which the Commission proposes would be to once again require television licensees to keep detailed records of the amounts of programming which they had broadcast in particular categories. This would be necessary in order for the broadcaster to be able to supply the quantitative information that the form would seek. Moreover, the burden would be a considerable one. Thus, if the Commission were to adopt the program categories proposed by the Advisory Committee, broadcasters would have to keep careful track of their presentation of local and national news programming, local and national public

affairs programming, programming that meets the needs of "underserved communities," programming including "candidate-centered discourse," other local programming, and both "locally originated" and other public service announcements.

As noted above, avoiding the necessity of imposing such a burden on broadcasters was one of the Commission's primary reasons for eliminating its quantitative license renewal guidelines in *Television Deregulation.* Observing that "the compliance costs associated with these guidelines ... . are significant," the Commission concluded that the burdens placed on broadcasters "incident to technical compliance and record keeping are inappropriate."[18] Nothing has changed since 1984 that would now justify reimposing those burdens on television licensees. Indeed, the exponential proliferation of sources of video programming since that time only serves to emphasize how anachronistic a reporting requirement of this kind would be.[19]

2. Requiring Television Licensee to Report on the Quantities of Programming They Had Broadcast in Particular Categories Would Unduly Impinge on Their Editorial Discretion and First Amendment Rights.

Although the adoption of the kind of reporting requirements proposed by the Notice would place needless burdens and costs on television stations, our most fundamental objection to such a rule is that it would constitute a clear infringement of broadcasters' editorial discretion and First Amendment rights. As Commissioner Furchtgott-Roth noted in his statement dissenting in part from the issuance of the Notice,

---

18 *Television Deregulation*, 98 FCC 2d at 1089.

19 *See, e.g., id.* at 1086.

"the concept of breaking out categories of programming on broadcasters' FCC forms" presents a "clear and present First Amendment danger."

> Having the government pick one kind of program substance over another, and then ask[ing] broadcasters to list what they have done in that particular area at the time of renewal, necessarily involves the Commission in direct content regulation. ... The coercion to air certain kinds of programming that the Commission has deemed to be in the "public interest" is not the sort of "general affirmative dut[y]" that courts have sanctioned under the First Amendment.[20]

Indeed, there can be no doubt that the effect of such a "reporting" requirement would be -- and would be intended to be -- coercive. The obvious purpose of such a requirement would be to exploit the vulnerability of broadcasters to the license renewal process to skew their editorial judgments in a direction favored by the government. Nor can it be questioned that this stratagem would likely prove highly effective; few broadcasters, confronted with a Commission form demanding to know how many minutes or hours they had devoted to programming for "people of color, the elderly, gays and lesbians"[21] would feel secure in answering "none." And any indication by the Commission of an amount of a particular kind of programming which is "recommended," or which would satisfy a "processing guideline," is sure to be taken as a command by any prudent broadcaster.

The courts have long recognized the constitutional implications of such "raised eyebrow" regulation. For example, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, [22] the United States Court of Appeals for the D.C. Circuit held

---

20 Notice at 25 (Separate Statement of Commissioner Furchtgott-Roth).

21 *See* discussion at page 7, *supra.*

unconstitutional under the First and Fifth Amendments a provision of the Communications Act which required non-commercial, educational television and radio stations which received federal funding to retain an audio tape of any program in which an issue of "public importance" was discussed. The Court stated:

> Noncommercial licensees, like their commercial counterparts, are subject to regulation and license renewal proceedings by the FCC. This renders them subject as well to a variety of sub silentio pressures and "raised eyebrow" regulation of program content. While recent administrations provide ample examples of open forms of such pressure,... more subtle forms of pressure are also well known. The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry, and the setting of a license for a hearing on "misrepresentations" all serve as means for communicating official pressures to the licensee.[23]

See also Lutheran Church-Missouri Synod v. FCC, 154 F.3d 487, 491, *petition for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (FCC's equal employment opportunity regulations unconstitutional because they "indisputably pressure -- even if they do not explicitly direct or require -- stations to make race-based hiring decisions"); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) (finding that informal "jawboning" by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America v. ABC*, 609 F.2d 355 (9th Cir. 1979) (agreeing that "the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA"), *cert. denied*, 449 U.S. 824 (1980).

---

22 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

23 *Id.* at 1116 (footnotes and citations omitted).

Of course, the constitutional implications of the proposed rules would be greatly magnified should the Commission also adopt quantitative standards as to the minimum amounts of programs in various categories which should be broadcast, as proposed by the Advisory Committee. Such rules would both conflict with the Commission's long-standing reluctance to quantify broadcasters' public interest obligations,[24] and strain the limits of the Commission's authority generally "to interest itself in the kinds of programs broadcast by licensees."[25]

From the earliest days of broadcasting, the Commission has been chary of specifying exactly how much of particular types of programming a licensee must present in order to meet its public interest obligations. Thus, in its 1949 *Report* first setting forth the responsibility of broadcasters to devote a reasonable amount of time to the coverage of controversial public issues, the Commission was careful to emphasize that "[i]t is the licensee ... who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting."[26] The FCC showed similar concern for the editorial discretion of licensees when it declined, in 1977, to adopt program percentage standards for determining what constituted "substantial service" in

---

24 The only quantitative standards adopted by the Commission which are currently in force are the Commission's license renewal processing guidelines regarding children's programming, which were adopted in response to the enactment of the Children's Television Act.

25 *See, National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975).

26 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, 1247 (1949).

the context of a comparative renewal proceeding. Because all licensees would feel compelled to meet such standards, the Commission found, their adoption would "artificially increase the time most television stations devote to local, news and public affairs programming," a result which would "represent a restriction on licensees' programming discretion." Saying that it was "not convinced that that government should impose on broadcasters a national standard of performance," the Commission concluded that quantitative program standards were "a simplistic, superficial approach to a complex problem," which it would not adopt.[27]

The Commission expressed similar distaste for quantitative program standards in *Television Deregulation*, where it found the replacement of numerical guidelines with a more flexible standard to be "more consistent with underlying First Amendment values."[28] The only programming obligation of a licensee, the Commission stated, should be "to provide programming responsive to issues of concern to its community of license,"

---

27 *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419, 428-29 (1977). The Commission also found that program percentage standards could threaten program quality:

> It is apparent that the value of a program to the viewing public is dependent on many variables, including the resources committed to its production and its relation to audience needs and interests. Those stations that increased their support for local and informational programming might well upgrade their service. However, others through choice or necessity might only spread their resources thinner, and reduce the quality and value of such programming. In short, increasing the amount of this programming would not necessarily improve the service a station provides its audience.

Id. at 427.

28 *Television Deregulation, supra,* 98 FCC 2d at 1090.

emphasizing that a licensee should be able to address issues "by whatever program mix it believes is appropriate."[29]

The courts have been no less sensitive to the First Amendment issues which would be raised by Commission regulations specifying the precise amounts of different types of programming which a broadcaster must present. For example, in *National Association of Independent Television Producers and Distributors v. FCC,*[30] the court upheld against constitutional challenge the exemption of certain categories of network programming from the former prime time access rule ("PTAR"). However, while sustaining the rules on the ground that, by exempting certain categories of programming from the strictures of PTAR, the Commission was "not ordering any program or even any type of program to be broadcast," the court cautioned that "mandatory programming by the Commission even in categories [might] raise serious First Amendment questions."[31]

Similarly, in *National Black Media Coalition v. FCC,*[32] the court affirmed the Commission's decision not to adopt quantitative standards for use in comparative renewal proceedings. Rejecting the argument that the First Amendment required such standards in order to objectify the comparative renewal process, the court observed that such an approach "would do more to subvert the editorial independence of broadcasters

---

29 *Id.* at 1092.

30 516 F.2d 526 (2d Cir. 1975) .

31 *Id.* at 536.

31 589 F.2d 578 (D.C Cir. 1978).

and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission."[33]

It is clear, then, that the Commission's adoption of a standardized form requiring broadcasters to report how much of particular program types they had aired would raise serious First Amendment questions.[34] This would be especially so if such a form were

---

33 *Id.* at 581.

3434 In *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723 (1997), a panel of the United States Court of Appeals for the District of Columbia Circuit sustained against First Amendment challenge a provision of the 1992 Cable Television Consumer Protection and Competition Act which required licensees of direct broadcast satellite services ("DBS") to reserve between four and seven percent of their channel capacity "exclusively for non-commercial programming of an educational and informational nature." 93 F.3d at 973. However, rather than providing support for content regulation of broadcasting, we believe that the *Time Warner* decision strongly counsels against an expansive reading of the Commission's authority in this area. Thus the panel's rationale in that case -- the familiar "spectrum scarcity" theory as articulated by the Supreme Court in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969) -- could not command a majority of the full court. A petition for rehearing *en banc* was denied by a 5-5 vote, with the five dissenters arguing that *Red Lion* should not be extended to justify content regulations imposed on DBS providers, because "[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting." 105 F.3d at 724. The dissenters went further, however, and expressed significant doubt as to the continued vitality of *Red Lion* "[e]ven in its heartland application" to broadcasting. *Id.*at 724, n.2 The dissenters noted that *Red Lion*

> has been the subject of intense criticism. Partly this rests on the perception that the "scarcity" rationale never made sense -- in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare). And partly the criticism rests on the growing number of available broadcast channels. While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice before extending it to another medium.

Id. Viacom respectfully suggests that with five members of the United States Court of Appeals for the D.C. Circuit questioning the fundamental validity of the *Red Lion* rationale -- which is the sole basis for imposing content regulations on broadcasters which would clearly be unconstitutional if applied to the print media (*see Miami Herald*

required in conjunction with precise numerical standards as to the minimum amounts of such programming necessary to presumptively satisfy the Commission. But it would also be true even in the absence of requirements other than the coercive demand for such programming which would be implicit in the Commission's inquiry as to how much of it had been presented.

There is no need for the Commission to embark on this path. Since 1984, the quarterly issues/program report adopted by the Commission in *Television Deregulation* has served to document the compliance of television station licensees with their bedrock public interest obligation -- that is, to provide programming responsive to issues of community concern. The issues/program report must include not only the title, time, date and duration of the programs which a licensee considers to be its "most significant" treatment of community issues during the preceding quarter, but "a brief narrative describing what issues were given significant treatment and the programming that provided this treatment."[35] Apart from a single conclusory complaint by one advocacy group that may be interpreted as suggesting that the issues/program report does not provide the information it requires,[36] the Notice cites no basis for believing that these reports have failed to accomplish their purpose.

Publishing Company v. Tornillo, 418 U.S. 241 (1974)) -- the Commission should be especially wary of returning to the more intrusive forms of regulation which were characteristic of another era.

35 47 CFR § 73.3526 (11) (i).

36 *See,* Notice at 4. Indeed, it is necessary to read the Notice with the utmost liberality to be able to divine even this degree of factual support for the Commission's apparent conclusion that the issues/program report is insufficiently informative. In this regard, the Notices quotes People for Better TV as stating, with respect to its members' review of the public files of television stations, that "the most consistent finding is the

We respectfully submit that these reports are completely adequate to the needs of a regulatory framework that requires television licensees to address public needs in their programming, but leaves the manner and appropriate "program mix" for doing so to their good-faith editorial discretion. That is why we fear that the current proposals -- which are presented as being designed only to "enhance disclosure" by licensees -- are in fact a stalking horse for additional substantive regulation. For reasons already alluded to, we urge the Commission not to resurrect regulatory policies which it has long since abandoned as burdensome and unnecessary. It would be uniquely perverse to do so at the very time when broadcasters must devote their full attention and resources to the daunting competitive challenges of the digital era.

3. Having Abandoned Formal Ascertainment Requirements Sixteen Years Ago, There is No Conceivable Reason for the Commission to Revive Any Species of Such a Requirement Now.

In its Notice, the Commission refers to recommendations by both People for Better TV and the Advisory Committee that the proposed standardized disclosure form include "information on the efforts licensees take to identify the programming needs of various segments of their communities."[37] In response, the Commission seeks comment on "whether licensees should provide a narrative description on the standardized form of

---

lack of consistency and uniformity about what is in the files." *Id.* Insofar as may be determined from a reading of the Notice, then, the Commission's tentative conclusions are not supported by so much as a single complaint from the public *specifically directed* to the information contained in the quarterly issues/program report.

37 Notice at 10, quoting Advisory Committee Report at 105. Similarly, People for Better TV advocates requiring broadcasters to disclose their public interest programming and activities ... matched against community needs." *Id.* at 7.

the actions taken, in the normal course of business, to assess a community's programming needs and interests."[38]

The Commission distinguishes such a potential requirement from its former ascertainment rules -- which it repealed as unnecessary in 1984 -- on the ground that the old regulations involved "detailed methodologies," while the proposed rule would only require broadcasters to set forth activities undertaken in the normal course of business.[39] Citing concerns expressed by People for Better TV that broadcasters "ignore certain communities," the Commission suggests that "disclosure to a community of how broadcasters identify its needs will promote the kind of dialogue between broadcasters and communities intended by our rules without the need for government intervention." [40]

The factors cited in the Notice clearly cannot justify the reimposition of ascertainment obligations. The Commission repealed its former ascertainment requirements not only because they were burdensome, but because it found "no evidence" that they had any beneficial effects. Thus the Commission found that "licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements";[41] accordingly, it concluded that "the benefits of the ascertainment requirements [do not] justify ... [its] costs," and that the requirements could be eliminated "with little or no risk

---

38 *Id.* at 11.

39 Id.

40 *Id.* at 12.

41 *Television Deregulation, supra,* 98 FCC2d at 1098.

of adverse effects on ... programming."[42] In accordance with these findings, the Commission announced that in all future proceedings

> the focus of our inquiry shall be upon the responsiveness of a licensee's programming, not the methodology utilized to arrive at those programming decisions. If the programming presented by the licensee satisfies its obligation, the ascertainment efforts of the station are irrelevant.[43]

In other words, the Commission found that ascertainment served no useful purpose and that the burden it imposed on licensees could not be justified. The fact that the bureaucratic burdens that would be entailed by the rule now being contemplated would be less extensive than those imposed by the old ascertainment requirements is no reason to adopt them. The present proposal, like the former requirements, would accomplish nothing of value.

As the Commission has recognized, "[b]roadcasters do not operate in a vacuum"; rather, "like other citizens, [they] are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide indications of those issues that are important to the community."[44] Indeed, any broadcast station with a news department is "ascertaining" community issues on a daily basis. Through their news personnel, the vast majority of broadcasters are constantly interviewing and otherwise obtaining the views of political and community leaders, those working for political and social change,

---

42 *Id.* at 1101.

43 *Id.*

44 *Id.* at 1100.

and various individuals affected by the poor functioning of community services or by the misdeeds of those whose actions should come under official scrutiny. Station contacts with the community are not limited to station news personnel. General managers, public affairs personnel and others, including sales personnel, are constantly in dialogue with various components of the community. As the Commission recognized in 1984, these contacts are essential to any broadcaster's ability to stay competitive, because a station that falls out of touch with the concerns of its community will fail in the marketplace.

Requiring broadcasters to prepare a quarterly report detailing their efforts "to identify the programming needs of various segments of their communities" would simply constitute paperwork for paperwork's sake. The Commission should reject calls for it to adopt rules so at odds with its purportedly deregulatory philosophy.

III. The Burdens of Requiring Broadcasters to Post the Contents of Their Public Files on the Internet Would Far Outweigh Any Benefits to the Public, and the Commission Should Therefore Decline to Adopt Such a Rule.

In a proposal that can only be termed remarkable, the Commission tentatively concludes in the Notice that television licensees should be required to post the entire contents of their public inspection files on the Internet, either on their own Web sites or on Web sites maintained by state broadcaster associations. Viacom respectfully submits that the adoption of such a rule is beyond the proper scope of the Commission's regulatory authority, would burden broadcasters without benefiting the public in any

significant way, and would constitute a singular example of regulatory excess. The Commission should not adopt it.

The sweep of this proposal is perhaps best illustrated with a hypothetical. Airlines, like television stations, are businesses that are regulated by federal agencies in the public interest, convenience and necessity. Airline schedules -- as well as flight delays and cancellations -- directly affect millions of people in their business and personal lives each day. It would certainly be a convenience to the traveling public if such information was available on the Internet, and many airlines undoubtedly maintain Web sites on which such information is posted. But can anyone imagine the FAA adopting a rule *requiring* an airline to maintain a Web site to make this essential information more accessible to the public?

The answer, we submit, is clearly no, for reasons which would strike almost anyone as commonsensical outside the field of broadcasting. Maintaining a Web site is not an essential element of operating an airline, and for the FAA to purport to regulate this aspect of an airline's business activities would grossly exceed its authority. Indeed, to take a more prosaic example, it would be unthinkable for the FAA to require an airline to purchase advertising in newspapers or on television to alert the public to possible travel disruptions due to an impending pilots' strike -- notwithstanding the fact that an airline might wish to do so voluntarily as a matter of customer relations.

The case is no different when the regulation of television stations by the FCC is involved. Maintaining a Web site -- let alone posting the voluminous contents of a public inspection file -- is simply too far afield from the core activities of broadcasting for the Commission to regulate. It is of an entirely different order from requiring a

licensee to retain certain records relating to its operations and to make them available to members of the public, at its place of business, during regular business hours. The latter is plainly within the Commission's jurisdiction. The former just as plainly exceeds it.

This conclusion is evident from the decision of the Supreme Court in *NAACP v. FPC*.[45] In that case, the NAACP challenged the Federal Power Commission's decision not to adopt equal employment opportunity rules, based on the agency's finding that it lacked jurisdiction to do so. Although the Court found that the FPC was authorized to consider the consequences of discriminatory employment practices on the part of its regulatees to the extent that such practices were directly related to the FPC's establishment of just and reasonable rates,[46] it held that the agency's general statutory charge to advance the public interest did not afford it any basis generally to involve itself in questions of employment discrimination by companies within its regulatory purview. Observing that its cases had "consistently held" that the use of the words "public interest" in a regulatory statute could not be construed as "a broad license to promote the general public welfare," the Court stated:

> [I]n order to give content and meaning to the words " public interest" as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted. In the case of the Power and Gas Acts it is clear that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices. While there are undoubtedly other subsidiary purposes

---

45 425 U.S. 662 (1976).

43 For example, the Court found that the FPC could disallow consideration, in a rate-making proceeding, of costs associated with backpay awards caused by illegal discriminatory practices.

> contained in these Acts, the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words " public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.[47]

Here as well, the FCC's authority to adopt regulations in the "public convenience, interest, or necessity"[48] must be read in terms of the Commission's statutory mandate to promote the development of "a rapid [and] efficient ... *radio communication service.*"[49] This language will simply not bear the weight of a Commission directive to its broadcast regulatees that they establish and maintain sites on the Internet on which they must post vast quantities of material.[50]

---

47 *Id.* at 669-70 (footnotes omitted).

48 47 U.S.C. § 303.

49 47 U.S.C. § 151 (emphasis added).

50 If any demonstration were necessary that the Supreme Court's holding in *NAACP v. FPC* also constrains the authority of this Commission to adopt regulations in the "public interest" which are essentially untethered to its core regulatory mandate, it is amply provided by the decision of the United States Court of Appeals for the D.C. Circuit in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *petition for reh'ing and suggestion for reh'ing en banc denied,* 154 F.3d 487 (D.C. Cir. 1998). In that case, the court applied the *NAACP* rationale to the FCC's equal employment opportunity rules, stating

> The only possible statutory justification for the Commission to regulate workplace discrimination would be its obligation to safeguard the "public interest," and the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency's specific statutory charge. Thus the FCC can probably only regulate discrimination that affects "communication service" -- here, that means programming.

The Court held that the Commission's asserted interest in the promotion of diverse programming was insufficient for its former EEO regulations to pass

The Commission's manifest lack of jurisdiction, however, is not the only reason why it should decline to adopt the proposed regulation. Just as importantly, the burden which such a rule would impose on broadcasters plainly outweighs the highly dubious character of any possible public benefit.

Remarkably, the Commission cites as justification for the proposed rule information to the effect that two-thirds of television stations in the top 100 markets presently have Web sites. Viewed from a more practical perspective, however, what this means is that fully one-third of these larger-market stations have found the commercial incentives insufficient to warrant creating and maintaining a site on the Internet; therefore, the Commission's proposed rule would force them to do so *solely for the purpose* of placing the contents of their public files on the Worldwide Web. The Commission offers no figures as to how many stations in the smallest one hundred markets may currently have Web sites, but it is reasonable to assume that an even greater number of those stations would be compelled to design sites for the sole purpose of vindicating the Commission's notions of the public good.

The Commission, we submit, is without authority to impose *any* costs on licensees for this purpose. In fact, however, such costs would hardly be trivial. In the first instance, a station not already having a Web site would almost certainly have to hire an outside consultant to design one, since few broadcasters are likely to have persons on staff with the necessary expertise to create a site in-house. While Web site design costs vary greatly, a survey by *NetMarketing* (published by Advertising Age) found that the

---

muster under the "strict scrutiny" test mandated by the equal protection clause of the Fourteenth Amendment. *See, Adarand Constructors v. Pena,* 515 U.S. 200 (1995).

average bid for design of a small-business, non-service intensive Web site was $26,100.[51] That figure is generally consistent with estimates reported in other leading publications.[52]

Next, maintaining a Web site requires leasing storage capacity on a server from a Web site host. In this regard, CBS owned television station WFOR-TV Miami estimates that, while its current Web server contract with Bellsouth provides for a storage capacity of 100 megabytes -- which currently accommodates its entire Web site -- a capacity of at least 265 megabytes (including necessary "headroom") would be required to post the approximately four thousand pages of material (including a massive transfer of control application, viewer mail, political sales materials, and its ownership report and exhibits) currently in its public file. The cost of leasing this additional capacity would be almost $ 2,000 per year.

The personnel costs involved would also be significant. Two CBS Television Group stations (WDCA-TV Washington and WFOR-TV Miami) have independently estimated that the startup personnel costs -- for scanning the complete contents of the public file and converting it to PDF format -- would be in the area of $3,000. (That

---

51 *See, The Orange County Register,* "Takes More than Spinning to Work Web," September 23, 1996, p. D-12. According to *NetMarketing,* bids ranged from a low of $2,800 to a high of $200,000.

52 *See, The Atlanta Constitution,* "Provider Offers "Free" Site Design," May 31, 1997, p. 2F (prices for design of Web site range from $2,000 to $20,000); *The Los Angeles Times,* "Heard on the Beat," April 21, 1997, p. D9 ($150 per page charged by Web site designer "near the less expensive end of professional Web site design services"); *The Business Journal,* "Web-Page Design Firms Are Changing Their Focus to Survive," April 7, 1997, p. 10 (small Web site can be created for $30,000); *San Diego Business Journal,* "When It's Right to Out-Source Your Company Web Site," December 9, 1996, p. B11 (pricing for the creation of Web site "can begin as low as $2,500 for a simple three to five page Web site, and rise to $20,000 and above for a site spanning 50 pages or more with many high-tech elements").

would be in addition to the approximate $1,000 price for a heavy-duty scanner for a station that did not already have one.)

In addition, Web master duties at both WDCA and WFOR are currently performed part-time by staff members with significant other responsibilities. The tremendous increase in the amount of material on their Web sites which the Commission's proposed rule would entail might well require the employment of a full-time Web master, at an estimated salary of approximately $30,000 per year.

While these costs are not insignificant by any standard, they must be measured against the highly dubious nature of the public benefit which the Commission's proposed rule might be expected to achieve. For all of the Commission's speculation about the advantages of members of the public being able to access a station's inspection file twenty-four hours a day,[53] the fact is that visits to the file are presently exceedingly rare. For example, WFOR-TV's Director of Community Affairs, who has been responsible for the station's public file for the last twelve years, states that, apart from visits to the political file by campaign workers during election periods (which she says are also minimal), public file visitors average less than one annually, virtually all of whom are college students on assignment. Based on its experience, Viacom believes this is typical of almost all television stations.

To impose on broadcasters a legal obligation to post on the Internet material in which there is so little evident public interest would truly be an exercise in bureaucratic overkill. The reasons advanced in the Notice for the proposed requirement can only be

---

53 Notice at 14.

described as flimsy; People for Better TV, for example, complains of the burdens on would-be public file inspectors who are sometimes forced to travel "several miles" only to be "turned away" or made to feel "uncomfortable."[54] The proper remedy in such instances is, of course, a Commission enforcement proceeding, and the issuance of a forfeiture to a licensee which has failed promptly and with appropriate courtesy to make its file available during normal business hours. It is not the totally disproportionate sanction of forcing the entire industry to place every page of its voluminous and seldom-inspected public file on the Internet.[55]

CONCLUSION

As we have shown, the Commission's proposals in this proceeding evoke the regulatory philosophy of another time, when over-the air stations affiliated with one of the three major networks were unchallenged as the dominant force in television, and it was thought necessary by some to micromanage many aspects of the business of

---

54 *See, id.* at 14, n.87.

55 The rule now being proposed by the Commission is, of course, totally at odds with its decision barely 18 months ago that only licensees which did not locate their main studios (and therefore their public files) within the community of license would be required to mail public file materials to members of the public in response to telephone requests. It was unnecessary to impose such a requirement except in these circumstances, the Commission found, since "[i]f a station chooses to locate its main studio and public file in its community of license ... the public file will be reasonably accessible [to the public]." *Memorandum Opinion and Order on Reconsideration, In the Matter of Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 14 FCC Rcd 11113, 11119 (1999). Having appropriately rejected the general imposition of this relatively modest burden on licensees where it was not necessary to ensure access

broadcasters to ensure that the public interest would be served. Since the mid-1980s, the Commission has gradually moved away from such intensive regulation, largely in recognition of the fact that subjecting over-the-air broadcasting to regulatory impediments not faced by its multichannel competitors could imperil the vitality and health of an industry that remains the primary source of free entertainment and local news programming to the television viewing public.

Were it not for the fact of the digital transition, it is difficult to believe that the Commission would now be considering the regulatory initiatives set forth in the Notice. But, as we have shown, those proposals are wholly unrelated to the advent of digital broadcasting, except to the extent that some advocates of greatly increased regulation view the transition as an opportunity to fight again the regulatory battles which they have lost on the merits in the past.

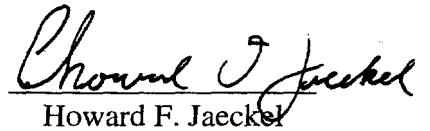
This Commission should not be party to any such effort to turn back the clock. to a long-gone era in broadcast history. Not only do the reasons for reducing the regulatory burdens on broadcasters remain as sound today as they were in 1984, but they are even more compelling at a time when the competitive robustness of free over-the-air television should be a matter of the highest priority. The Commission should close this docket without further proceedings.

---

to public file materials, it is difficult to comprehend why the Commission should be considering the imposition of so much more onerous a burden now.

Respectfully submitted,

VIACOM INC.

By: 
Howard F. Jaeckel

Its Attorney

51 West 52nd Street
New York, New York 10019

December 18, 2000